REDACTED--FOR PUBLIC INSPECTION



April 30, 2012

Marlene H. Dortch Secretary Federal Communications Commission 445 Twelfth Street, SW Washington, DC 20554

Re: Applications of Cellco Partnership d/b/a Verizon Wireless, SpectrumCo, LLC, and Cox TMI Wireless for Consent to Assign Licenses; WT Docket No. 12-4 Notice of *Ex Parte* Meeting

Dear Ms. Dortch:

On April 26, 2012, Harold Feld, Legal Director, and Jodie Griffin, Staff Attorney, of Public Knowledge met with Louis Peraetz, Legal Advisor to Commissioner Mignon Clyburn to discuss the proposed license transfer and commercial agreements between Verizon Wireless, SpectrumCo, LLC, and Cox TMI Wireless.

FCC Staff Inappropriately Encourage and Condone Overbroad Designations of Confidentiality.

Public Knowledge (PK) urged the Commission to ensure that the parties and the public have a meaningful opportunity to thoroughly review the record. This requires not only a willingness to take the time to accumulate the necessary information before reaching relevant conclusions and allowing parties opposed to the transfer to respond. It also includes scrupulous adherence to the high standard required to designate information "confidential" or "highly confidential." As PK has repeatedly observed, the inappropriate designation of information as "highly confidential" imposes significant costs on parties accessing the information, and undermines the ability of all parties to discuss important policy matters in an open and transparent manner.

In particular, PK objected to recent statements by Verizon that, in an effort to expedite document production, it has begun designating all responsive documents as "highly confidential." Worse, *it would appear from Verizon's letter that FCC staff encourage and condone this overbroad designation of confidentiality*. Regardless of Verizon's stated intent to return at some future date and 'declassify' documents that should not have been designated as

¹ See Letter from John T. Scott, III, VP & Deputy General Counsel, Verizon Wireless, to Marlene Dortch, Secretary, FCC (Apr. 25, 2012), available at http://apps.fcc.gov/ecfs/document/view?id=7021913549; Letter from John T. Scott, III, VP & Deputy General Counsel, Verizon Wireless, to Marlene Dortch, Secretary, FCC (Apr. 19, 2012), available at http://apps.fcc.gov/ecfs/document/view?id=7021912067.

² *Id.* "As discussed with staff, given the subject matter of the requests to which these documents are responsive, and in order to expedite this production, all documents have been temporarily designated "Highly Confidential" under the Second Protective Orderin this docket."



confidential in the first place, staff should not permit – and certainly should not condone and encourage – a process that shortchanges the public record (and imposes additional expense on Petitioners such as PK) in the name of expediency.

PK appreciates the desire of Applicants and staff to expedite review. But review includes meaningful opportunity for parties and members of the public to read what material is made available to the public record and time to respond. It ill-serves both the public debate on critical matters of policy and undermines the FCC's commitment to transparency when staff decide that it is better to expedite matters through overbroad designations of confidentiality. This is especially true in light of recent objections by Applicants to representatives of Netflix's Acknowledgements of Confidentiality on what can only be described as a hyper-technical reading of the Second Protective Order. If parties such as Netflix are to be limited to the public record, then FCC staff have an obligation to ensure that parties excluded from viewing the confidential record have as complete a record as possible, and the same time to respond as other parties.

Where proper document production requires some brief delay for the Applicants to appropriately review the documents for confidential information, the appropriate response is to stop the clock – not short change the public record or cut short the public debate. While Applicants understandably focus on the cost of delay, it is the responsibility of the Commission to focus on the cost to PK and others when overbroad designations of confidentiality compress the time for the public to analyze and respond to the documents.

Verizon's Stated Intent to Hold A Private Auction of Its Lower 700 MHz A&B Licenses Does Not Adequately Address the Problem of Spectrum Concentration Caused By The Proposed License Assignments.

Regarding the proposed spectrum transfers between Verizon Wireless and SpectrumCo and between Verizon Wireless and Cox TMI Wireless, Public Knowledge urged the Commission not to consider Verizon's recent announcement that it will sell certain of its 700 MHz licenses unless the sale of those licenses is made a condition to the Commission's approval of the transaction. As Verizon itself stated, the commitment is entirely voluntary, and Verizon may not transfer the licenses if it does not like the prices offered. The FCC cannot include the mere possibility of a transfer of some unknown number of licenses to an unknown provider or providers when evaluating the impact of the instant transaction on the public interest.

Even if the If the sale of those licenses becomes a condition to the transaction, the Commission should still consider how that sale will impact wireless consumers. Particularly in light of recent events confirming that large swaths of new spectrum will not be available in the new future, the gap between the spectrum controlled by Verizon or AT&T and the spectrum licensed by the rest of the competing wireless carriers in the U.S. is becoming increasingly important to competition in the wireless market.

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³ See Letter of Verizon Wireless, SpectrumCo,, Cox Wireless, Bright House Networks, Comcast, and Time Warner Cable, to Marlene Dortch, Docket No. 12-4 (filed April 11, 2012).



The "Spectrum Gap" v. The "Spectrum Crunch."

The "spectrum gap," the difference between the largest spectrum providers and competitors, is at least as pressing an issue as any purported "spectrum crunch." The Commission needs to seriously consider the long-term anticompetitive implications of imbalanced spectrum holdings among carriers. Public Knowledge notes that both issues can be addressed with a revised spectrum screen. Not only could a revised spectrum screen help the Commission better allocate spectrum among various carriers to ensure healthy competition, it can encourage efficient use and build-out goals that ensure allocated spectrum benefits the public. For example, to address the spectrum gap, spectrum should be weighted by its suitability for mobile data use, and spectrum that is held by dominant carriers or carriers with already substantial spectrum holdings should be weighted more highly. This would ensure that spectrum is actually counted for the purposes of the screen correctly, by dispensing with the false notion that all spectrum is equal. This also could counter the "foreclosure value" that some carriers might see in spectrum, whereby they are willing to pay for licenses just to keep them out of the hands of competitors. And to address any spectrum crunch, spectrum that has not yet been built out or that uses inefficient technologies could also be weighted more highly. This ensures that carriers that wish to obtain more spectrum are already making maximal use of the spectrum they already have, and allows fallow spectrum to go to the carriers that could best use it, as opposed to those who can bid the most for it.

There are several areas in which further research and analysis will benefit the Commission's understanding of the effect of spectrum efficiency and further spectrum aggregation on smaller wireless carriers and on consumers. Specifically:

- What incentives could wireless carriers have to decrease output in the face of increasing network congestion?
- How will the instant proposed spectrum transfer affect parties' incentive to raise prices for wireless services?
- What can past spectrum auctions and spectrums transfers tell us about the relationship between a carrier's market dominance or existing spectrum holdings and its incentive to build-out or decrease output in wireless service?

Public Knowledge continues to advocate that the Commission deny the proposed transactions, including both the spectrum transfer and side agreements. If the Commission decides to approve the spectrum transfer contingent on certain conditions, strong roaming obligations will better protect competition than divestment. Even if Verizon divests some licenses, the transfer will still increase its dominance in spectrum holdings over smaller carriers, particularly as a nationwide carrier. Ensuring that Verizon will provide roaming to smaller carriers on reasonable terms is the only way that will preserve their competitive viability. Although behavioral conditions are often more difficult to monitor and enforce than divestments, the overwhelming benefits of roaming obligations make this condition appropriate.

Issues Pertaining To the Agreements.

Public Knowledge noted that the Commission has authority to resolve the issues posed by the license transfer and side agreements within the instant proceeding, but also has authority over the agreements independent of the license transfer. The cross-marketing, resale, and Joint Operating Entity ("JOE") agreements threaten a number of harms to competitors and consumers. For example, [BEGIN HIGHLY CONFIDENTIAL]

⁵ [END HIGHLY CONFIDENTIAL] This substantially restricts Verizon's ability to [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

Public Knowledge also noted that the Applicants have claimed confidential or highly confidential treatment for parts of the commercial agreements that are germane to the Commission's review of the proposed transactions, significant to the public interest, and do not contain confidential information. For example, sections of the [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY]

CONFIDENTIAL] and contain information that directly supports Public Knowledge's arguments that the proposed transactions create an attributable interest under the Commission's rules.⁶

Finally, Public Knowledge raised concerns with regard to recent patent's claimed by Time Warner Cable that, in conjunction with the side agreements, raise significant competition concerns and underscore PK's position that the JOE could develop a portfolio of foundational technology patents that could be used in an anticompetitive manner. Recently, TWC filed to obtain a patent for "Wi-Fi roaming" that would allow users to move seamlessly from TWC's Wi-Fi network to Verizon's Wireless network without reinitiating a session. TWC also announced recently the PTO had approved its application for a patent on "virtual ownership" of video programming – essentially a form of cloud storage and on-demand access. Absent the transaction, as the articles suggest, it would make sense for Time Warner Cable to team with Cablevision to provide a competing mobile service within its footprint in competition with

⁴ [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

⁵ [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

⁶ See Petition to Deny of Public Knowledge et al., WT Docket No. 12-4 (Feb. 21, 2012), Conf. App. at A-8; Reply Comments of Public Knowledge et al., WT Docket No. 12-4 (Mar. 26, 2012), at.20-22.

⁷ See Steve Donahue, "Time Warner Cable Files WiFi Roaming Patent Application," Fierce Cable (April 13, 2012) available at: http://www.fiercecable.com/story/time-warner-cable-files-wifi-roaming-patent-application/2012-04-13

⁸ See Steve Donahue, "How Will Time Warner Cable and Verizon Wireless Innovate," Fierce Cable (April 26, 2012). Available at: http://www.fiercecable.com/story/how-will-time-warner-cable-and-verizon-wireless-innovate/2012-04-26

Verizon Wireless and Verizon's FIOS service. In addition, TWC would have incentive to license these patents to other wireless providers such as T-Mobile or AT&T.

Post-transaction, however, [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL] Even without these concerns, the continuing business relationships between TWC and Verizon Wireless would eliminate TWC's existing incentives to use these patents to vigorously compete with Verizon.

A redacted version of this letter is being filed electronically pursuant to Section 1.1206 of the Commission's Rules and the Protective Orders in this proceeding. Should you have any questions, please contact the undersigned.

Sincerely,

/s/

Harold Feld Legal Director

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